

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

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**PRUITTHEALTH VETERAN SERVICES-NORTH CAROLINA, INC.,**

**Respondent**

**and**

**RICKY EDWARD HENTZ, an Individual,**

**Petitioner**

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**RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

**PruittHealth Veteran Services –  
North Carolina, Inc.,**

**Respondent,**

**and**

**Ricky Edward Hentz, an Individual,**

**Petitioner.**

**Case: 10-CA-191492**

**RESPONDENT’S REPLY BRIEF IN SUPPORT OF EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

Respondent PruittHealth Veteran Services-North Carolina, Inc. (“Respondent” or the “Veterans’ Home”), pursuant to Rule 102.46 of the Board’s Rules and Regulations, submits this reply brief in support of its exceptions to the decision of Administrative Law Judge (“ALJ”) Keltner W. Locke dated May 4, 2018.<sup>1</sup> The briefs filed by the General Counsel and the Counsel for the Charging Party, Ricky Hentz, confirm that the ALJ erroneously concluded that the Veterans’ Home disciplined, demoted, and discharged Ricky Hentz (“Hentz”) because he had engaged in protected concerted activities under Section 7 of the National Labor Relations Act (“NLRA”). Neither brief establishes that the individuals with whom Hentz spoke about work-related matters planned to take any action with respect to them. Nor did those briefs point to testimony from the employees on whose behalf Hentz purported to speak as to what concerns those employees honestly and reasonably held during their employment. The record is further silent on

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<sup>1</sup> Respondent uses the same abbreviation format in this brief as in its Brief in Support of its Exceptions.

whether those employees had any interest in Hentz speaking on their behalf. Linda Brinson, for example, reported having no concerns about race discrimination. Indeed, if any employee other than Hentz had any vested interest in Hentz raising these concerns, surely those employees would have been called to testify at the hearing. Noticeably, they were not. Hentz offered testimony about his conversations with those individuals; however, the Charging Party's own brief confirms that the testimony offered by Hentz was never offered for the truth of the matter asserted. (Charging Party's Answering Brief ("CP Brief") at 4 n.3.) In reality, the conversations Hentz had with other employees about staffing or race-related matters were nothing beyond "mere talk." Thus, there was no group action and no "group complaints"; only Hentz's "individual gripe." The General Counsel failed to establish its burden of proof, and the ALJ erred in concluding otherwise.

Further, the evidence at the hearing shows Hentz's testimony to be internally inconsistent and inconsistent with the preponderance of the record evidence on several key points, including what information he shared directly with Administrator Justin Morrison. Tellingly, neither the General Counsel nor Charging Party's own counsel is able to adequately defend the contradictions and conflicts in Hentz's own testimony as highlighted in Respondent's exceptions.

In addition, as explained in more detail below, Charging Party's counsel's reliance on prior authority to support the ALJ's conclusions is misplaced. Those cases are easily distinguishable from the facts at hand and do not support the conclusion that Hentz engaged in protected concerted activity. For those reasons, and the reasons expressed in Respondent's Exceptions and Brief in Support of its Exceptions,<sup>2</sup> the ALJ's decision should be reversed and the allegations in Paragraphs 9-14 of the General Counsel's Complaint pertaining to the discipline, demotion, and termination of Hentz should be dismissed.

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<sup>2</sup> Respondent stands by each argument in its Exceptions Brief and each of its exceptions, will not repeat all of those here, and instead focuses on several key points for the Board's consideration.

**I. THE ALJ ERRONEOUSLY CONCLUDED THAT HENTZ HAD ENGAGED IN PROTECTED CONCERTED ACTIVITY UNDER SECTION 7 OF THE ACT**

**A. The Clear Preponderance of the Evidence Does Not Support the Conclusion that Hentz Told Morrison That He Would Contact PruittHealth’s Corporate Office to Report Alleged Race Discrimination by Activities Director Amy Ferguson.**

(Exceptions 1, 7, 31, 36)

A central question in this case pertains to what information Hentz communicated directly to Administrator Justin Morrison about so-called employee concerns. The evidence and arguments by the parties overwhelmingly show that the ALJ clearly erred in finding that Hentz told Morrison:

I feel like Amy definitely treats African Americans differently than she do [sic] others, and I’m not the only one. I’ve had that conversation with other people as well who felt like there definitely was a discrepancy in the way that she treated African Americans. I mean she was very standoffish and whatnot. And I told him I was going to corporate.

ALJD 25:24-30. The ALJ failed to address the fact that this statement conflicted with the evidence as identified in Respondent’s Brief in Support of its Exceptions, including the testimony of Justin Morrison, Jennifer Horton, and Hentz’s own testimony (including Hentz’s testimony that, when he was questioned by Morrison about why someone from PruittHealth’s Corporate Office was coming to the facility, Hentz referred to only “some staff” (and not himself) having concerns and added, “Well, I don’t really know,” a statement a reasonable person would not naturally make if that person had, in fact, made the above-quoted statement. (Tr. 147:19-149:6.)

Neither the General Counsel nor Charging Party’s counsel reconciles these obvious contradictions in the record, presumably for one simple fact – such reconciliation is not possible. The General Counsel claims that Hentz attempted to downplay his role. (GC Brief at 8.) However, if Hentz *had already told Morrison directly* what he was going to do, there would be no need to subsequently “downplay” the matter, and Morrison would not have even needed to inquire about the matter *because he would have already known* who had called PruittHealth’s Corporate Office

and why. Thus, the explanation offered by the General Counsel strains credulity,<sup>3</sup> and the ALJ's opinion on this issue is unsupported by the clear preponderance of the evidence and must be reversed. See Standard Drywall Products, 91 NLRB 544 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951).

B. The ALJ Failed to Make Required Findings As To, And Otherwise Properly Evaluate, the Sincere and Good Faith Beliefs Held by Individuals Whose Concerns Hentz Purportedly Represented.

(Exceptions 6, 9, 10, 11, 14-18, 20, 21, 23, 27, 29, 34)

As explained in Respondent's Exceptions Brief, the ALJ erred in concluding that Hentz had engaged in protected concerted activity when he walked along with Morrison and told Morrison about the CNAs' complaints that the floors were understaffed. ALJD 11:24-26. The ALJ's opinion erroneously does not identify whose belief Hentz supposedly reported to Morrison when he was walking in the hall (See PPG Aerospace Indus., Inc., 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part), and the ALJ's opinion is also erroneous because it fails to make the necessary findings as to whether the employees, on whose behalf Hentz was reportedly speaking in his conversations with Morrison, had an honest belief that the facility was understaffed or of any other concern presented. See N.L.R.B. City Disposal Systems, 465 U.S. 822, 840; 29 CFR 101.11(a).

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<sup>3</sup> The General Counsel claims that Morrison knew of the basis for the Veterans' Home's investigation into Hentz's call to PruittHealth's Corporate Office because Horton claimed that Morrison made reference to Hentz thinking that Morrison was racist. (GC Brief at 8.) This testimony does not comport with the record evidence. Hentz never complained to PruittHealth's Corporate Office about alleged race discrimination by Morrison and, instead, expressly *denied* feeling any discrimination from Morrison. (Tr. 357:4-17.) Hentz's concern pertained to alleged race discrimination by Activities Director Amy Ferguson. (*Id.*) Thus, Horton's statement is no evidentiary basis from which to conclude that Morrison knew the substance of Hentz's communications to PruittHealth's Corporate Office or during the subsequent investigation.

The General Counsel and Charging Party’s counsel argue that NLRB v. City Disposal Systems, 465 U.S. 822, 840 (1984), does not apply in this context. (Gen. Counsel Brief at 10; CP Brief at 30.) However, neither party offers any plausible justification for why the *type* of concerns amounting to protected concerted activity is or should be any different in the context of concerns tied to a collective bargaining agreement as opposed to ones arising outside that context. No such distinction is found in the text of the NLRA itself. See 29 U.S.C. §§ 151-169. No such distinction makes sense. Cf. Meyers Indus., Inc., 281 NLRB 882, 888 (1986) (“[I]n construing Section 7 we are not holding that employee contract rights are more appropriate subjects for joint employee action than are rights granted by Federal and state legislation concerning such matters as employee safety.”).

Moreover, the requisite showing is low – as established in City Disposal Systems, whether activity is concerted and protected within the meaning of Section 7 does not depend on the “correctness” of the belief. 465 U.S. at 840. Rather, Respondent’s argument is only that these beliefs must be shown from a sufficient evidentiary basis to have been honestly and reasonably held. While this standard is low, it is one that generally depends on testimony from the individuals purporting to hold those beliefs and one which was not satisfied as part of the General Counsel’s burden of proof. Affording legal protection to beliefs that are *not* honestly held or beliefs that are unreasonable is at odds with the spirit of the Act and sound labor board policy.<sup>4</sup>

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<sup>4</sup> Charging Party claims that Respondent has raised belated hearsay objections to evidence regarding employee concerns. (CP Brief at 4 n.3.) The honesty of those employees’ beliefs are not hearsay issues because no such testimony was elicited at the hearing. Instead, these are matters that pertain directly to the General Counsel’s burden of proof in this case. See Meyers Industries, 268 NLRB 493, 496 (1984), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), reaffirmed 281 NLRB 882 (1986) (“In the past, we required the General Counsel to prove support by other employees in order to find activity concerted. With *Alleluia [Cushion Co.]*, the Board seemed to require a respondent to submit evidence that other employees disavowed the activity to prove that it was not concerted. This is a clear shift in the burden of proof, not countenanced by either the legislative history or judicial interpretation of

C. The Cases Cited by Charging Party Do Not Support the Conclusion that Hentz Engaged in Protected Concerted Activity Under Section 7.

(Exceptions 6, 9, 11, 27, 34-38.)

Charging Party's counsel cites several cases to support the proposition that Hentz's communications to Administrator Justin Morrison were sufficient to constitute protected concerted activity. However, these cases are factually distinguishable from this case.

The Charging Party's counsel cites Consumers Power Company, 282 NLRB 130, 131-32 (1986), for the proposition that an individual employee's complaint to management concerning safety that had been raised in a prior group meeting was concerted without regard to whether he was joined by other employees in making the complaint or specifically authorized to make the complaint. (CP Brief at 25.) However, Consumers Power Company is distinguishable. In that case, the Board concluded that one employee clearly acted "with" within the meaning of Meyers Indus., 268 NLRB 493 (1984), when the two approached a supervisor together about an employee having been sent to an area without police protection. 282 NLRB at 131. The Board further concluded that one employee also acted "on the authority" of the other because the other employee acquiesced in the employee's suggestion "we had better go and get supervision in on this before somebody gets killed." Id.

Here, unlike in Consumers Power Company, Hentz did not approach Morrison with a complaint or concern while physically present with another employee. Similarly, Hentz never testified he approached Genice Campbell, Tammy Ellis, or Della Mervin flanked by another

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Section 7.") Indeed, Charging Party's own Answering Brief confirms that the testimony offered by Hentz was never offered for the truth of the matter asserted. (CP Brief at 4 n.3.) In any event, Respondent's exceptions and objections are raised in accordance with Board Rules 102.41 and 102.46(b)(2) and at the first available opportunity upon notice of Hentz's testimony being used for an improper purpose.

employee to report a concern. Therefore, Hentz did not act “with” any other employees within the meaning of Meyers Industries, 268 NLRB 493.

Further, Hentz never acted “on the authority of other employees.” No evidence shows that the employees with whom Hentz spoke conferred upon him express authority or requested that Hentz take their concerns to management. Nor did any of those employees acquiesce to any particular suggested future action. The facts of this case do not, for example, show that Hentz said to Rick Luce, Brandi Sigmund, or others, “Let’s go call corporate,” or “Let’s go talk with Justin Morrison about these issues,” or “I will call corporate in the future on our behalf and report back what they say about our concerns” with those employees thanking Hentz or otherwise signifying by their actions their expressed support for Hentz’s planned next steps. The testimony Hentz offered with respect to his communications with Linda Brinson and Danielle Jeter referred to his call to PruittHealth’s Corporate Office as being in the rear-view mirror. (Tr. 138:24-139:10.) Hentz’s counsel claims this was a misstatement (CP Brief at p. 20 fn.7); however, the record provides no reason to believe that Hentz talked directly with Brinson or Jeter about *any specific plan* to report these matters to PruittHealth’s Corporate Office before he did so. Instead, there was only mere talk, with no anticipated group action and nothing to be done in concert with anyone else.

The Charging Party’s counsel cites NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995), for the proposition that a conversation involving only a speaker or a listener may constitute concerted activity, and the “lone act of a single employee is concerted if it ‘stems from’ or ‘logically grew’ out of prior concerted activity. (CP Brief at 25.) However, Charging Party fails to identify the “prior concerted activity” out of which any lone act by Hentz grew that would satisfy this standard. Further, Mike Yurosek & Sons is also distinguishable. In that case, several

employees complained about a new work schedule that would not allow them time to finish their work, and they refused to stay at work an extra hour on the ground that they were adhering to a schedule posted by the Warehouse Manager. 53 F.3d 261, 263 (9th Cir. 1995). The employer interviewed and subsequently discharged each employee who refused to stay. Id. The Board found that, although the employees may not have discussed or expressed a shared motive for refusing to stay, they acted as a group and subsequently were treated as a group. Id.

Here, unlike in Mike Yurosek & Sons, there was no action taken by anyone other than Hentz. This is not a case in which, for example, four employees all reported alleged wrongdoing to Morrison or to PruittHealth's Corporate Office on the same day. Hentz was the only one who made any such alleged report and there is no indication that the persons with whom he spoke authorized or ratified or otherwise expressed support for that report being made. Hentz himself neglected to provide any indication that he followed-up with anyone (such as Luce, Sigmund or others) after he spoke with Morrison. If Hentz's goal was to act on their behalf, then such follow-up would naturally have occurred. These facts support the conclusion that, for all of the testimony elicited at the hearing, it was "mere talk" that was neither concerted nor protected under Section 7 and nothing that served as a "logical outgrowth" of prior concerted activity.

Further, here, unlike in Mike Yurosek & Sons, there is no indication of Hentz and others being treated "as a group." Neither the General Counsel nor Charging Party's counsel introduced any evidence at the hearing of Hentz and others (such as Sigmund, Luce, et al.) being disciplined, allegedly demoted, or discharged in any way. These facts point to the unescapable conclusion that there was no group activity and no improper motivation in this case.

The Charging Party's counsel claims that Tex-Togs, Inc., 112 NLRB 968, 973 (1955), enf'd, 231 F.2d 310 (5th Cir. 1956), is analogous. To the contrary, Tex-Togs is also

distinguishable. In that case, two employees (Teresa Perez and Esperanza Minjarez) approached the employer's General Manager together in the General Manager's office and presented concerns related to wages and vacations. 112 NLRB No. 986. The ALJ said, "What is clear, and beyond question, is that [Minjarez and Perez] acted together – i.e., in concert – in their interview with [the supervisor] and that Minjarez was the spokesman for both." Id. at 973. The judge concluded that, "A presentation by 2 or more persons of a grievance affecting only 1 is concerted activity within the meaning of the Act." Id.

Here, unlike in Tex-Togs, Hentz did not present his concerns to Morrison in Morrison's office or while on the phone with anyone else. At no point did Hentz ever testify he approached Justin Morrison, Genice Campbell, Tammy Ellis, or Della Mervin with another employee present to report a concern. Thus, there was no "presentation by 2 or more persons of a grievance" to management, making the facts of this case fundamentally different than those in Tex-Togs, Inc.<sup>5</sup>

D. The Unsupported Arguments of Counsel Do Not Provide Justification for Affirming the ALJ's Decision.

Charging Party's Answering Brief contains numerous unsupported inferences and misstatements of the record to try to show that some nefarious motive affected Hentz's

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<sup>5</sup> Charging Party cites Citizens Investment Services Corp., 342 NLRB 316, 326 (2004), enf'd, 430 F.3d 1195 (D.C. Cir. 2005), for the proposition that actions of an individual employee in complaining about the company's handling of compensation issues were protected as they were intended to bring management's attention to the issue and advance group interests. However, Citizens Investment Services Corporation concerned an individual who characterized himself as the "union president" based on his role for the group and reported a "general consensus" as to the group's response to decisions affecting compensation. Id. Here, the record evidence shows that, while Hentz made attenuated and passing reference to other employees when he called PruittHealth's corporate office to complain about Ferguson, his primary focus was on himself, stating, "I'm not here to talk about them. I'm here to talk about me" (Tr. 364:21-23; 370:1-3; 373:16-375:19; 379:14-21; 384:1-4), a statement to which Mervin testified to multiple times (see id.), and Hentz never rebutted. Such statement goes to the very heart and nature of Hentz's communication. No such testimony was reportedly adduced in Citizens Investment Services Corporation.

employment. For example, Charging Party's Answering Brief states, "Morrison admitted that he fired Hentz because of his complaints of racial bias." (CP Brief at 40.) This is untrue. The record evidence cited in support of that statement is Jennifer Horton's testimony, which refers to a statement that Morrison reportedly made, which expresses concern, in part, with Hentz's interactions with patients in the Veterans' Home—a statement that suggests that Hentz's interaction with the Veterans' Home's patients (if not also prior complaints Hentz's coworkers had raised about him) had indeed prompted consideration of whether to end Hentz's employment relationship with the Veterans' Home. (See Tr. 485:7-486:10; 486:14-22; 517:8-527:22.) Morrison's candid testimony at the hearing addressed head-on his concerns near the end of Hentz's employment with not only Hentz's inconsistent attendance at work, but also with Hentz's patient interaction, including concerns about a report that Hentz had ignored a resident's call button (Tr. 535:18-536:15.) Misstatements of the record such as these do not form a sufficient evidentiary basis from which to affirm the ALJ's ruling.<sup>6</sup> Accordingly, the General Counsel did not satisfy its burden, and the ALJ made numerous reversible errors in concluding otherwise. Accordingly, Respondent's exceptions should be accepted and the ALJ's opinion overturned on these matters.

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<sup>6</sup> Charging Party's counsel makes claims about Hentz's discussions with an individual named Jackie Walker, a Case Mix Coordinator. (CP Brief at 39-40; Tr. 241:19-23.) Charging Party's counsel refers to Walker as a "supervisor." However, no such testimony was ever elicited at the hearing or stipulated to by the parties. See Tr. 266:19-25; Jt. Exh. 1. Charging Party's counsel claims that the ALJ concluded that conversations Hentz had on December 13, 2016, amounted to protected concerted activity, citing the ALJ's Decision (p.50, lines 32-34), which states only, "Hentz clearly engaged in protected terms and conditions of employment with other employees and then expressing their concerns to management." The ALJ's finding in that regard is so vague it cannot fairly be said to be in reference to any communications involving Walker. Moreover, there was never any testimony that Hentz reported any such concerns to management. To the contrary, Hentz confirmed he did not talk to Morrison about anything Walker said. (Tr. 327:7-9.)

Respectfully submitted this 13th day of July, 2018.

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**Case: 10-CA-191492**

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 13th day of July, 2018, date I have served a copy of the foregoing *Respondent's Reply Brief in Support of Exceptions to Administrative Law Judge's Decision* on counsel for Ricky Edward Hentz and General Counsel, by depositing same in the U.S. Mail, postage prepaid, and addressed as follows, as well as via Electronic Mail:

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